



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2 OF 1970

PARKLANDS PROPERTIES LIMITED.....PLAINTIFF

VERSUS

PATEL.....DEFENDANT

RULING

The averments in the plaint state that on September 1, 1957, the plaintiff verbally agreed to sell, and the defendant to buy, a house and plot on which it stood (to be sub-divided) at the purchase price, and upon the further terms, set out in paragraph one; that the defendant went into possession in pursuance of the said agreement on September 1, 1957, and receipt of rents and profits of the said house and has so remained in possession ever since; also that the defendant from time to time made part payments by way of deposit against the purchase price, other dues and interest, the last of such payments being on January 29, 1959.

The plaint continues that on March 31, 1961, the defendant as purchaser signed a letter addressed to the plaintiff as vendor authorizing and requesting the plaintiff to carry out the work therein described to the suit plot which he thereby acknowledged as having purchased from the plaintiff; that the defendant further agreed to pay to the plaintiff the full cost of such work the same to be added to the balance of the purchase price of the plot to be paid upon grant of the title to it to the defendant.

The plaint also claims that a revised agreement concerning the aforesaid transaction was made in writing between the parties on August 12, 1966, relating to the value of the property and other dues which the defendant would pay the plaintiff.

Another averment in the plaint states that on July 21, 1969, the plaintiff's advocates offered the deed plans of the suit plot to the defendant requiring him to draw and proffer an assignment thereof for execution by the plaintiff, and that the defendant has refused to complete the sale as against the plaintiff who is and has always been ready and willing to perform its part of the bargain; that a notice sent on November 14, 1969, requiring the defendant to complete the contract also failed to produce any result, as also the threat by another notice dated December 17, 1969, that the plaintiff regarded the contract sued upon as having been broken by the defendant, and that the plaintiff would take such steps as it may be advised in the matter.

The plaintiff claims it is entitled to specific performance, and/or rescission, and/or possession of the house, and in either event damages for delay and/or loss of rent and/or loss of bargain; in the alternative to possession of the house and mesne profits and/ or an account of rents and profits. The prayers are

framed accordingly.

The defendant filed a written statement of defence denying, save as expressly admitted therein, all allegations in the plaint. He also pleaded the defence of adverse possession in paragraphs 2 and 6 as follows:

"2. With regard to paragraphs 1 and 2 of the said plaint, the other contents whereof in the way of allegations as above are denied, the defendant admits that on the 25th day of August, 1957 he took and is since then continuously until the date of this defence, holding adverse possession of the house in which the defendant has been residing as stated in the plaint, together with the land within its curtilage bounded on one side by Pandya Road and on the other two sides by Salisbury Lane and Radhaswami Road in Nairobi in the Republic of Kenya - such holding being adverse to the plaintiff company."

... ..

6. The defendant also categorically denies the allegations contained in paragraphs 11, 12, 13 and 14 of the plaint, or in any of them, and adds that his possession referred to in the said para 14 of the plaint, is adverse as stated in paragraph 2 above."

The plaintiff has moved the court for an order striking out the words in paragraph 2 of the defence beginning with the words "the defendant admits" down to the end of the said paragraph, and in paragraph 6 beginning with the words "and adds that" down to the end of the paragraph on the grounds that the defence fails to comply with the rules of pleading, discloses no reasonable answer and is embarrassing; that it fails to set out material facts, namely, the plaintiff's title was ever expressly repudiated by the defendant, and if so the date and mode of such repudiation, knowledge of the assertion of the adverse claim on the part of the plaintiff, the date and mode in which such claim was brought to the knowledge of the plaintiff, the possession when originally taken being with the leave and licence of the plaintiff (whether as a bare licensee or as a tenant at will), showing that on any specific date on or after August 25, 1957, the possession became "adverse" as distinct from "permissive" or from such date, if any, the possession was continuous and without interruption, the length of such possession, or from when to when it was, or was not consensual in the capacity of a tenant at will or bare licensee.

In order that the defendant may not be deprived of any possible defence, the hearing of the plaintiff's application was adjourned, the defendant being given leave to file an amended defence.

The defendant has filed an amended defence. Paragraph two has been enlarged by the insertion of "Further and Better Particulars" to the effect *inter alia* that on the August 25, 1957, the plaintiff representing to be the owner through its director one TM Patel, granted to the defendant a month to month tenancy at a rent of Kshs 500 pm payable in advance, of the house on plot No 19 and its out-houses on plot No 20, and of the land of these two plots, which were approved subdivisions of a larger plot; that the defendant relying on such representations became a tenant of the plaintiff and entered into possession of the said two plots and paid the first month's rent of Kshs 500 in cash which later, on the instructions of the said TM Patel, he paid it into the plaintiff's banking account to the knowledge of the plaintiff and the said TM Patel; that the defendant did not pay any further rent thereafter for more than twelve years preceding the date of the filing of the suit.

In regard to the letter dated the March 31, 1961, the defendant has also amended paragraph 3 of the defence by the addition of the following words:

“because of a misrepresentation made by the said TM Patel, then orally to the defendant, at Nairobi, to the effect that the aforesaid sub-divided plots 19 and 20 had been re-numbered 31, by relying on which misrepresentation, defendant made the signature.”

The plaintiff's learned counsel has submitted that the application to strike out should be allowed as the defence as amended still provides no answer to the plaintiff's claim.

Now the rule is that the court will not strike out a defence which on the face of it appears to provide, as in this case, an answer to the plaintiff's claim, and, when the merit of the defence, in this instance the defence of adverse possession, is a matter of evidence. In addition, the argument on behalf of the plaintiff that adverse possession does not commence because a right of action does not accrue unless, in this case, the tenancy is first determined in accordance with the provisions of Section 106 of the Transfer of Property Act, is in my opinion defeated by the Limitation of Actions Act, (Cap 22) which reads as follows:

12.(2) A tenancy from year to year or other period, without a lease in writing, is taken to be determined at the end of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy accrues at the date of such determination:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action accrues on the date of the last receipt of rent.

It seems to me this particular provision is unrelated to Section 106 of the Transfer of Property Act because, it also seems to me, these two provisions are designed to serve separate purposes. Under Section 106 a tenancy is brought or is sought to be brought to an end by an act of the landlord or tenant: under sub-section (2), Section 12, the tenancy is determined by operation of law in a certain event which the parties cannot prevent upon the event taking place.

Section 13.(1) of the same Act reads as follows: 13.(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

The plaintiff's learned counsel conceded that in this case the land is in the physical possession of the defendant, and that he is a person in the terms of Section 13 in whose favour, the period of limitation could run. The remaining issue requiring a decision therefore is whether the defendant's possession is adverse which I have already stated is a matter for evidence. If the defendant could successfully establish the particulars pleaded by him, the plaintiff's action must fail by virtue of the provisions of Section 7, for at the expiration of the therein prescribed period of limitation the plaintiff's title to the land could be extinguished.

For these reasons I think it would be wrong to accede to the plaintiff's application. I dismiss it.

As regards the costs of the application the original defence was an open invitation for a striking out application. It was filed by an advocate of considerable experience on behalf of the defendant. I think it was deliberately drawn in a non-committal fashion to leave the field free for maneuvering. It was wrong tactics. The further and better particulars now pleaded could easily and should have been included in the defence originally. The plaintiff was justified in making the application; therefore, the costs of the

application shall be to the plaintiff in any event, to be paid within twenty one days of taxation.

Dated and Delivered at Nairobi this 10th day of August 1970

C.B.MADAN

JUDGE



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